Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	**)**	
	)	
Review of the Commission's	**)**	MM Docket No. 98-204
Broadcast and Cable	**)**	
Equal Employment Opportunity	**)**	
Rules and Policies	**)**	

REPLY COMMENTS OF NOW *et al.*

The National Organization for Women, Office of Communication of the United Church of Christ, Inc., Minority Media and Telecommunications Council, and many other civil rights, labor, trade and religious organizations (NOW *et al*.)[1] respectfully submit reply comments in response to the Comments of the National Association of Broadcasters (NAB) and Joint Comments of the Named State Broadcasters Associations (State Broadcasters) in the above captioned proceeding.[2]

At the outset, we note that neither NAB nor State Broadcasters argue that CIPSEA requires the FCC to keep broadcasters' annual employment report forms confidential. Rather, NAB argues that affording confidential treatment would be "good public policy because it will enhance the Commission's ability to keep its stated policy of not using Form 395-B data to assess the EEO compliance of individual broadcasters."[3] State Broadcasters argue that requiring the employment data to be publicly available is unconstitutional. The Commission has

[1] The full list of parties to these comments is included as footnote 1 in our initial comments.
[2] Based on the FCC's ECFS system, no other parties have filed comments in this proceeding.
[3] NAB Comments, Executive Summary.

previously rejected these arguments, and it should do so again here.[4] Making the employment data available to the public is both good public policy and constitutional.

I. CIPSEA DOES NOT REQUIRE CONFIDENTIAL TREATMENT NOR DOES COLLECTION OF ANNUAL EMPLOYMENT DATA FALL SQUARELY WITHIN THE PARAMETERS OF CIPSEA

Neither the NAB nor State Broadcasters argue that CIPSEA requires the FCC to keep broadcasters' annual employment report forms confidential. Instead, they argue that CIPSEA "permits" the Commission to collect the data pursuant to a pledge of confidentiality.[5] There are several problems with their argument.

First, the application of CIPSEA is premised on the assumption that the employment data is collected solely for statistical purposes.[6] Yet, as NOW *et al.* demonstrated in initial comments, the data may serve a variety of legitimate purposes that would not be solely statistical.[7]

Second, the general language of CIPSEA cannot override the specific mandate in Section 334 prohibiting the FCC from modifying Form 395-B for television stations. NAB argues that Section 334 is no bar because it claims that changing the forms to make the identity of the licensee filing the form is a merely a "nonsubstantive technical revision."[8] To the contrary, modifying a practice of more than thirty years and depriving the public of the right to know about the employment practices of the stations licensed to their communities is clearly a

[4] *See* MO&O, 15 FCC Rcd 22548, 22558-60.
[5] NAB Comments at 3. *See also* State Broadcasters Comments at 11 (arguing maintaining confidentiality "consistent" with CIPSEA).
[6] NAB Comments 3-5.
[7] NOW *et al*. Comments at 4-7.
[8] *Id*. at 8.

material, substantive change.[9] Thus, CIPSEA does not permit the FCC to change its longstanding practice of making television stations' Form 395-B data available to the public.

Finally, even if CIPSEA would allow confidential treatment, it does not require it. NOW *et al.* have identified several strong public policy reasons in favor of keeping this information public.[10] None of the examples cited by NAB of other agencies' use of CIPSEA to maintain confidentiality provide a precedent for keeping Form 395-B data confidential.[11] For example, the DOT's survey of motorcycle riders seeks to conduct face-to-face interviews with "both licensed and unlicensed" riders to "determine rider characteristics and factors leading to motorcycle crashes."[12] Because the agency seeks information from unlicensed riders who could be subject to criminal sanctions, guaranteeing confidentiality is necessary to ensure truthful responses. No similar concerns apply here. The DOC example cited by NAB actually applies a different part of CIPSEA, § 524(d) "Sharing of Business Data Among Designated Statistical Agencies," which authorizes the DOC to share previously confidential information with the Census Bureau.[13] Thus, NAB cites no relevant precedent for allowing Form 395-Bs to be filed on a confidential basis.[14]

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[9] A "nonsubstantive" change typically involves such things as correcting a typographical error or updating the names of offices. *See, e.g., Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service,* 18 FCC Rcd 21432, 21467 (2003).

[10] NOW *et al.* Comments at 10-11.

[11] *See* NAB Comments at 7.

[12] 68 Fed. Reg. 22769, 22769-70 (Apr. 29, 2003).

[13] NAB Comments at 7, citing 68 Fed. Reg. 65031 (Nov. 18, 2003). Moreover, many of the DOE surveys cited by NAB to which CIPSEA was applied are distinguishable because they deal with sensitive issues implicating homeland security or corporate financial information. *See* 69 Fed. Reg. 7457 (Feb. 17, 2004).

[14] Even if the FCC chose to reverse decades of practice and make form 395-B confidential, the tear-off proposal by State Broadcasters and NAB, *see* NAB Comments at 10, State Broadcasters Comments at 3, violates the Federal Records Act because it creates "dismembered documents." *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1285 (D.C. Cir. 1993).

II. BROADCASTERS LACK ANY LEGITIMATE FEAR THAT THE DATA WILL BE MISUSED AND IGNORE THE PUBLIC INTEREST IN ACCESS TO EMPLOYMENT DATA

NAB's main policy argument rests on its belief "that, notwithstanding the Commission's assurances, a substantial risk remains that Form 395-B data may be misused to challenge individual stations' compliance with EEO rules."[15] State Broadcasters similarly assert that "[t]he fact that the FCC has stated that it is not currently willing to equate underrepresentation with intentional discrimination does nothing to dispel the legitimate concern that such under-representation-based petitions, objections, or complaints will heighten the incidence of 'government audits,' whether on that purported basis, another purported basis, or a mix of purported bases."[16]

Such distrust of the FCC is not only disrespectful of the FCC, but borders on paranoia. The FCC could not have made it clearer, in both the text of the *3rd R&O* and the Note to Rule 73.6312, that it will *not* use annual employment data to assess the compliance with the EEO rules of any individual broadcast licensee. Similarly, the FCC has made clear that audits will be conducted randomly.[17]

The Commission has previously rejected similar arguments made by NAB in seeking reconsideration of the *2000 Report and Order*, finding:

> We have made it clear that we will not use this data for purpose of assessing any aspect of an individual station's compliance with our EEO rule, and that we will summarily dismiss pleadings alleging EEO violations based on that data. Therefore, *we do not believe that there is a legitimate basis for broadcasters to fear that the data will be used against them in EEO enforcement proceedings.*[18]

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[15] NAB Comments at 8-9.
[16] State Broadcasters' Comments at 6-7.
[17] *2d R&O*, 17 FCC Rcd 24018, 24066 (2002).
[18] *MO&O*, 15 FCC Rcd 22548, 22559 (2000).

It is still true today that broadcasters have no legitimate fear that data will be used against them in EEO enforcement proceedings, and thus, the Commission should again decline to accede to the industry demands that they be allowed to keep that information secret.

Indeed, NOW *et al.* wonder why the broadcasters (unlike cable companies and common carriers which must also make annual employment reports publicly available) are fighting so hard to keep their employment statistics hidden from public view. Is it because they have something to hide? As we argued in our initial comments, one of the reasons to require public disclosure is that disclosure can cause licensees to self-assess and take care not to discriminate.[19] Since broadcasters have no legitimate fear that the FCC will misuse Form 395-B data, there is no reason to withhold this information from the public.

III. REQUIRING PUBLIC DISCLOSURE OF EMPLOYMENT STATISTICS DOES NOT VIOLATE EQUAL PROTECTION

Citing the *Lutheran Church* and *MD/DC/DE Broadcasters Ass'n* decisions, State Broadcasters argue that requiring stations to publicly file annual employment data would "place unconstitutional pressure on stations to hire based on race, ethnicity, and gender."[20] However, the FCC has previously considered and rejected this argument.

In reinstating the filing requirement in the *2000 Report & Order*, the Commission explained:

> we do not believe that the filing of annual employment reports will impermissibly pressure broadcasters or cable entities to adopt racial or gender preferences in hiring because the data in the annual employment reports will not be used for screening renewal application or considered in assessing compliance with our EEO requirements.[21]

On reconsideration, the Commission again rejected the:

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[19] NOW *et al*. Comments at 10.
[20] State Broadcasters' Comments at 3.
[21] 15 FCC Rcd 2329, 2358.

> contention that the collection of employment data might result in race-based hiring. We do not believe that a broadcaster would take into account an applicant's race in connection with a particular hire because of its highly attenuated impact on future regulations affecting the industry generally.[22]

The broadcasters have presented no new evidence to suggest that the mere disclosure to the public of their annual employment reports would cause them in any way to make hiring decisions based on race. Indeed, to support the claim that "third parties might use the Form 395-B data to target individual licensees," State Broadcasters and NAB both cite the same sources.[23] But these quotes, which have been taken out of context, and which are not new, do not support the broadcasters' claim.

First, they cite page 315 of comments filed by MMTC in 1999 for the claim that MMTC intends to "liberally draw inferences from statistics" to determine which stations are discriminating.[24] When read in context, it is clear that these comments are referring to what the Commission should do to enforce its requirement of non-discrimination, not what MMTC might do.[25] Moreover, MMTC urges the Commission to examine all relevant evidence of possible discrimination, not solely statistical evidence, in assessing claims of actual discrimination.[26] In

[22] 15 FCC Rcd at 22559.
[23] Compare State Broadcasters' Comments at 5 with NAB Comments at 9-10.
[24] State Broadcasting Comments at 5, citing MMTC Comments on the NPRM at 315.
[25] This phrase appears in a section of MMTC's comments advocating that the Commission adopt a zero tolerance policy for discrimination. MMTC Comments in MM Docket No. 98-204 at 275-322 (filed Mar. 19, 1999). The paragraph actually reads: "The FCC's statistical review should be comparable to a thoroughly investigated EEOC systematic or class action case. These investigations liberally draw inferences from statistics, and the FCC should do so as well." MMTC Comments in MM Docket No. 89-204 at 315 (filed Mar. 19, 1999)(footnote omitted).
[26] MMTC's Comment urge the FCC to also take into account a variety of non-statistical evidence including contentions made by the license in applications or filings, the existence of previous admonitions or sanctions, practices at commonly owned stations and headquarters, and EEOC charges. *Id*. at 311-322.

so doing, the comments merely urge the Commission to do what other agencies and courts do on a routine basis.[27]

Second, the broadcasters claim, based on footnote 459 in MMTC's 1999 Comments, that MMTC intends to challenge stations where there is a difference of "two standard deviations from the make up of the local market."[28] Although footnote 459 used the phrase "two standard deviations," it was describing the methodology utilized in an employment discrimination case in Supreme Court.[29] Moreover, MMTC goes on to say, in language not quoted by the broadcasters, that "[w]e acknowledge that under *Lutheran Church*, these tests cannot be used to determine whether a licensee adhered to the FCC's procedures aimed at ensuring equal opportunity."[30]

Third, the broadcasters cite language from NOW's Intervenor's brief in *MD/DC/DE Broadcasters Ass'n* to the effect that Form 395-B data will make stations "more accountable" to their communities. But reading this language in context makes clear that NOW understood that station specific employment data could not be used to challenge individual license renewals. The paragraph talks about how even under the former EEO rules, petitions to deny license renewals based on EEO violations were rarely filed, much less granted, and that petitions to deny would be even less likely to be filed under the new rules because the FCC had committed to

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[27] The court in *Lutheran Church* recognized that statistics may be appropriately used in Title VII cases. 154 F.3d at 493.

[28] State Broadcasters' Comments at 5, citing MMTC Comments on the NPRM at 315 at n. 459.

[29] MMTC Comments at 316, n. 459, discussing *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

[30] MMTC Comments at 316, n. 459. The phrase "two standard deviations" also appears in a letter from MMTC. Letter from David Honig to Marlene H. Dortch in MM Docket No. 98-204 (Oct. 1, 2002). But again, it does not support the broadcasters' contention. That letter mentions the use of "two standard deviations" in describing the methodology of a study conducted by Professors Alfred W. and Ruth G. Blumrosen. *Id*. at 16. This study, which used the EEOC's EEO-1 data, not data from Form 395-B, conducted statistical analyses of various industries, including broadcasting, and concluded that intentional discrimination continues on a major scale.

summarily dismiss petitions based on employment profile data. That section concludes: "While making station-specific information public is unlikely to result in petitions to deny, it can help make stations *more accountable* to the public by fostering constructive dialog between stations and their communities and allowing market forces to play a role."[31] Thus, it is clear that NOW is referring to community efforts to work directly with local broadcasters, something that could not possibly raise equal protection concerns because there is no state action involved.[32]

Thus, the Commission should reaffirm its prior conclusion that requiring broadcast stations to file and make public Form 395-B does not raise any constitutional problems.

[31] NOW Br. at 27 (filed July 21¸2000).

[32] *See generally, San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (holding that a state "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Id*. at 546 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). It is not unconstitutional for members of the public to encourage broadcast stations (or any other business or institution) to hire more minorities and women. Organizations do this all the time. Nor would the use of data from Form 395-B by such organizations for such purposes turn their actions into state action. The public is of course free to use its knowledge about a station's employment profile drawn from by watching or listening to a station or meeting with its staff. The additional information provided by Form 395-B merely ensures that the public has more accurate and complete information than the information about station employment that is routinely and informally available from station employees, from taking the station tour, or from competitors.

CONCLUSION

For the foregoing reasons, NOW *et al.* respectfully requests that the Commission promptly reject the broadcasters' requests for confidential treatment and set a date by which broadcasters and MVPDS must file their annual employment report.

Respectfully Submitted,

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